

AO 243 (Rev. 09/17)

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court		District SOUTHERN DISTRICT OF NEW YORK
Name (under which you were convicted): Vladimir TSASTSIN		Docket or Case No.: 11-CR-878(LAK)
Place of Confinement: Moshannon Valley Correctional Center	Prisoner No.: 91040-054	
UNITED STATES OF AMERICA		Movant (include name under which convicted) Vladimir TSASTSIN
V.		

MOTION

18CV5975

1. (a) Name and location of court which entered the judgment of conviction you are challenging:
**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF NEW YORK**

(b) Criminal docket or case number (if you know): **11-CR-878(LAK)**

2. (a) Date of the judgment of conviction (if you know): **April 26, 2016**

(b) Date of sentencing: **April 26, 2016**

3. Length of sentence: **87 months**

4. Nature of crime (all counts):

Conspiracy to Commit Wire Fraud 18 U.S.C. § 1349
Conspiracy to Commit Computer Intrusion 18 U.S.C. § 1030(a)(4)

5. (a) What was your plea? (Check one)

(1) Not guilty ☐

(2) Guilty ☒

(3) Nolo contendere (no contest) ☐

6. (b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to?

6. If you went to trial, what kind of trial did you have? (Check one)

Jury ☐

Judge only ☐

7. Did you testify at a pretrial hearing, trial, or post-trial hearing?

Yes ☐

No ☒

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8. Did you appeal from the judgment of conviction? Yes ☐ No ☒

9. If you did appeal, answer the following:

- (a) Name of court: _____
- (b) Docket or case number (if you know): _____
- (c) Result: _____
- (d) Date of result (if you know): _____
- (e) Citation to the case (if you know): _____
- (f) Grounds raised: _____

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☐

If "Yes," answer the following:

- (1) Docket or case number (if you know): _____
- (2) Result: _____
- (3) Date of result (if you know): _____
- (4) Citation to the case (if you know): _____
- (5) Grounds raised: _____

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications, concerning this judgment of conviction in any court?

Yes ☒ No ☐

11. If your answer to Question 10 was "Yes," give the following information:

- (a) (1) Name of court: US DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
- (2) Docket or case number (if you know): 11-CR-878 (LAK)
- (3) Date of filing (if you know): March 12, 2018

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(4) Nature of the proceeding: Rule 36, Correct clerical error in the Judgment

(5) Grounds raised:

Clarify foreign jail credit application for the current sentence

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☒(7) Result: Denied(8) Date of result (if you know): May 17, 2018

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court:

(2) Docket of case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☐

(7) Result:

(8) Date of result (if you know):

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☒(2) Second petition: Yes ☐ No ☒

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

Did not need to appeal, because from the Court's response Petitioner learned that the mistake is more profound and is related to ineffective assistance of counsel.

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12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground. Any legal arguments must be submitted in a separate memorandum.

GROUND ONE: Sixth Amendment and Due Process violation regarding credit for Estonian sentence

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Petitioner's attorney explained to him and confirmed based on information received from the prosecutor that Petitioner would be credited for time spent in foreign custody. Attorney assured that the credit would be granted and the question was only by which party - the BOP or the Court. So that he is not inadvertently credited by both parties. Petitioner relied on these agreed terms when he signed the plea agreement. Petitioner's attorney not only assured that Petitioner would receive foreign jail credit but also presented an email exchange between the prosecutor and the attorney as a proof (Attached to the Memorandum).

(b) Direct Appeal of Ground One:

- (1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐

No ☒

- (2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

- (1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐

No ☒

- (2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

- (3) Did you receive a hearing on your motion, petition, or application?

Yes ☐

No ☒

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(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☒

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

Foreign jail credit was granted by the BOP and petitioner was expecting to be released on February 28, 2018. Petitioner did not have any reason to raise this issue, because the BOP granted foreign jail credit to him at that moment.

GROUND TWO: Ineffective assistance of counsel for failure to raise Government's breach of plea regarding offense level

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Before the sentencing hearing Guidelines became more lenient to the Petitioner. During the hearing the prosecutor and Petitioner's attorney confirmed that they were in agreement under the new Sentencing Guidelines. Offense level wasn't stipulated in the plea agreement, rather offense level was calculated as a sum of 7 stipulated terms. Petitioner's offense level should have been 24, but the prosecutor breached the agreement by requesting to sentence Petitioner on offense level 28. Petitioner's attorney did not object.

(b) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

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(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☒

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

Foreign jail credit was granted by the BOP and Petitioner expected to go home on February 28, 2018. Petitioner understood that he would be released before any motion could be resolved.

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GROUND THREE: Ineffective assistance of counsel for failure to explain the Court's error in calculation of stipulated offense level.
Sentence on the wrong guidelines

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

During the sentencing the Court erred and attorney failed to explain to the Court that only terms and not the offense level were stipulated in the plea agreement. To calculate correct stipulated offense level the Court should have taken the Sentencing Guidelines that were in effect on the date of Petitioner's sentencing and stipulated offense level could be calculated as a sum of the terms under the Sentencing Guidelines. Attorney failed to explain and the Court used incorrect stipulated offense level to sentence Petitioner.

(b) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐

No ☒

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐

No ☒

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐

No ☒

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐

No ☒

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐

No ☐

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(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

Foreign jail credit was granted by the BOP and Petitioner expected to go home on February 28, 2018. Petitioner understood that he would be released before any motion could be resolved.

GROUND FOUR: Ineffective assistance of counsel for failure to raise Government's breach of plea regarding offense level for leadership role

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

On the day of the sentencing the offense level with the terms stipulated in the agreement should have been 24. To bring offense level back to 28 and to justify it the prosecutor said something about leadership enhancement. The only reason to add leadership points when Sentencing Guidelines became more lenient to Petitioner was to get the level back to 28. Therefore the prosecutor breached the plea agreement. And attorney didn't object.

(b) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If you answer to Question (c)(1) is "Yes," state:

Additional grounds

Ground Five: Ineffective assistance of counsel for failure to raise Government's breach of plea regarding loss amount

The prosecutor argued during the sentencing that the results of Petitioner's actions was a loss amount that is much higher than stipulated in the plea agreement. Petitioner was sure that he was going to be punished for "more than \$1 Million but less than \$2.5 Millions" loss. And this influenced the Court's decision. The prosecutor breached the plea agreement, and as a result the Court was persuaded to give a higher sentence. Attorney failed to say anything or object.

Ground Six: Breach of plea by changing forfeiture

Petitioner signed the plea agreement with \$2.5 millions forfeiture. And during the plea allocation hearing the Court only considered a \$2.5 millions forfeiture. Unlike other defendants who agreed to forfeit higher amounts and other properties. Petitioner didn't agree to forfeit bank and investment accounts. But recently he learned that the Government seized more than \$2.5 millions and by that breached the agreement. Petitioner asks the Court to order the Government to forfeit only the property that is listed in his plea agreement and his Judgment and return whatever is held illegally. He didn't raise this issue before, because only recently Petitioner learned from his family that the amount seized from him was more then what it says in the Judgment.

Ground Seven: Ineffective assistance of counsel for failing to request an application of U.S.S.G. § 5G1.3(b)

Sentencing attorney failed to address the U.S.S.G. § 5G1.3(b), which is applicable in Petitioner's case. As a result Petitioner's sentence wasn't adjusted for time served for relevant conduct and a sentence was not imposed concurrently with Estonian sentence as it should have been. Also, attorney failed to raise the issue of Petitioner's undischarged term of imprisonment, that the term was for relevant conduct and that the BOP couldn't credit him this time. Adjustment of the sentence and concurrency pursuant to U.S.S.G. § 5G1.3(b) was not mentioned at all during the sentencing. Petitioner's attorney made an incorrect statement in the Court during the sentencing. He misled the Court by saying that Petitioner's sentence in Estonia was anticipated instead of undischarged.

Ground Eight: Ineffective assistance of counsel. Attorney failed to adequately investigate the case and request correction in the PSR

Petitioner met with his plea attorney and asked him to file objections to the PSR: a) for the leadership points (PSR paragraph 66); b) specify that there was no substantial hardship to any victim (Victim Impact, paragraph 55); c) to mention in the PSR a recommendation to credit petitioner for relevant conduct in Estonia(pursuant U.S.S.G § 5G1.3). However, it states in the PSR that Petitioner didn't have any related cases. Has the Probation Officer known that Petitioner had an undischarged term of imprisonment for relevant conduct, he would give his own recommendation to the Court to impose a concurrent sentence pursuant to U.S.S.G § 5G1.3. But this important fact was missing from the PSR because of the ineffectiveness of the attorney.

Ground Nine: Ineffective assistance of counsel for failing to file a timely Notice of Appeal

Petitioner asked the attorney to file a notice of appeal, but attorney responded that Petitioner didn't have any grounds for a successful appeal and only Rule 35 could help if Petitioner wanted to reduce his sentence. Attorney argued against the appeal in light of the fact that the Court had already sentenced Petitioner to a term within his plea agreement's stipulated Guidelines range. However, despite his counsel's position against an appeal, Petitioner ordered his counsel to file a notice of appeal and bring the case to the 2nd Circuit. Defense counsel ignored Petitioner's request and was ineffective.

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Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐No ☒

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐No ☒

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

Foreign jail credit was granted by the BOP and Petitioner expected to go home on February 28, 2018. Petitioner understood that he would be released before any motion could be resolved.

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

All of them presented for the first time.

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14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the you are challenging? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At the preliminary hearing:

Jeremy Schneider, David Stern, Lucos Anderson

(b) At the arraignment and plea:

Jeremy Schneider, David Stern, Lucos Anderson

(c) At the trial:

(d) At sentencing:

Arkady Bukh, Charles Kaser

(e) On appeal:

(f) In any post-conviction proceeding:

(g) On appeal from any ruling against you in a post-conviction proceeding:

16. Were you sentenced on more than one court of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐

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18. **TIMELINESS OF MOTION:** If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

Petitioner's § 2255 motion is timely submitted to this Honorable Court, because Petitioner was prevented from filing a motion by governmental action (government's errors explained in the Background section of the Memorandum attached to this motion) and one-year period starts on the date the impediment was removed (pursuant to U.S.C. § 2255(f)(2)) and/or one-year period starts on the date on which facts supporting the claim or claims presented could have been discovered (pursuant to U.S.C. § 2255(f)(4)). These government's errors and facts supporting the claim were discovered during a period of time from December 14, 2017 till March 30, 2018 and one-year period of limitation started not earlier than December 14, 2017 and hence did not expire yet. The prosecutor herself confirmed government's error (the BOP errors) in her response in Document 174 in Petitioner's docket. The claims in this Petition are a consequence of these errors. For example a fact that Petitioner didn't actually get foreign jail credit appeared only when the BOP rolled back the credit and as a result Petitioner's term of imprisonment effectively extended by more than 2 years. Petitioner didn't have any reason to submit this Petition before because he had jail credit from the BOP and because he expected to be released on February 28, 2018.

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

- (1) the date on which the judgment of conviction became final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

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Therefore, movant asks that the Court grant the following relief:

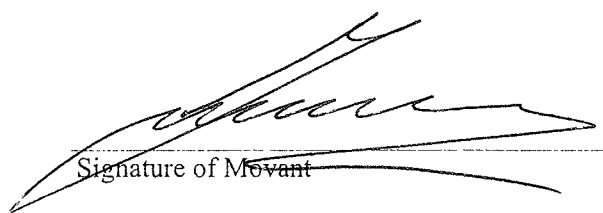
Re-sentence according to the grounds presented in this Petition

or any other relief to which movant may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on 06/21/2018
(month, date, year)

Executed (signed) on 06/20/2018 (date)



Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.